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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 1022

BROTHERHOOD OF RAILROAD TRAINMEN INSURANCE DEPARTMENT, INC., et al.,
Petitioner,

vs.

WILLIAM CHARLES ELLGASS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Brotherhood of Railroad Trainmen Insurance Department, Inc., a corporation, by its attorneys, respectfully petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on February 4, 1965.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals is to be found in the appendix attached to this petition and also transcript of record, pp. 92-97. This is a judgment of the United States Court of Appeals reversing the judgment of the United States District Court for the Northern District of California, Southern Division, granting summary judgment in favor of defendant.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 4, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Should an insurer be estopped from relying upon the contractual period of limitation within which to bring action upon its contract because it gives erroneous reasons for denying liability to make further payments under the contract?

2. Is it proper to impose upon a labor union operating a fraternal benefit society engaged in writing certain kinds of insurance for union members more onerous standards with respect to denying liability and starting the running of the period of limitations than would be applicable to any other insurance carrier?

STATEMENT

Respondent (plaintiff below) was the insured under an Accident and Health Income Protection Policy issued October 1, 1939, by petitioner. He claimed an accidental injury on September 7, 1945, but did not discontinue work until June 28, 1946. Thereafter, petitioner made payments to plaintiff until March, 1948, at which time respondent was notified in writing as follows:

> "This is the final payment due under Part Eight of your Certificate; no further payment can be made for any disability due directly or indirectly, wholly or in part to your present disability, or for any other disability while this present condition disables you. Therefore, if you desire to cancel your Certificate, return it in the enclosed self-addressed, stamped envelope with a signed letter so stating."

Respondent did not cancel his certificate; he continued paying premiums and on February 11, 1963, filed his verified complaint alleging in part as follows:

> "That the defendant did pay the monthly disability specified in said policy from 1946 until March 3, 1948, or a total sum of approximately Twenty Four Hundred Dollars ($2400.00). When the final payment check was mailed to the plaintiff on or about March 3, 1948, the defendant advised the plaintiff that the plaintiff was considered wholly, totally, and continuously disabled thereafter by the condition for which maximum benefits had been paid, and that no further claim for monthly benefits could be recognized because he had received the maximum benefits payable.

> Said statement was directly contrary to the terms and provisions of the policy, and particularly the lifetime indemnity rider and the waiver of disability rider, and that the defendant made such statements to the plaintiff intending to deceive the plaintiff as to the nature and extent of the plaintiff's rights under said policy, well knowing at the time of the physical and mental infirmities of the plaintiff. That because of the nature of the relationship existing between the parties the defendant had the duty to refrain from any statements which were false or misleading regarding the extent of the defendant's liability to the plaintiff."

After filing its Answer, Amended Answer and Request for Admission of Truth of Matters of Fact, petitioner filed its Notice of Motion and Motion for Summary Judgment contending in part that plaintiff's action was barred by the terms of the insurance contract since it was not brought until long after five years from the expiration of time within which proof of loss is required by the contract of insurance. The United States District Court for the Northern District of California, Southern Division, granted summary judgment for defendant and plaintiff appealed to the United States Court of Appeals for the Ninth Circuit. That Court reversed the judgment of the District Court. The learned judge who wrote the opinion said with respect to the letter of March 1948 from petitioner to respondent (hereinabove set forth):

> "We think it is only realistic to suppose that this plaintiff, this brakeman, reposed more trust and

confidence in President Whitney and the General Secretary and Treasurer of his union than in anyone else in the world. He would have gone on strike, if President Whitney told him to do that, and would have immediately returned to work if President Whitney told him to do that. The defendant union, in operating its insurance department, did not purport to entrust it to underlings whose statements and actions even a brakeman might question. The letters to this brakeman came from the General Secretary and Treasurer, the highest officer in the union, after President Whitney. We think it did not show an inexcusable lack of due care for his own interests, on the part of the plaintiff, that he did not suspect that his union was doing him wrong and take his papers to a lawyer. He had been told that his case came within Part Eight of his insurance certificate, and that he had been paid all that he was entitled to receive. These statements were inexcusably erroneous on the part of the union, and we see no equity in permitting the union to profit by its own wrong."

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below is in conflict with the law of the State of California as established by *Neff v. New York Life Ins. Co.*, 30 Cal. 2d 165, 180 Pac. 2d 900.

2. Since this case involves no federal issue and was brought in a federal district Court because of the diversity of citizenship of the parties, the federal

Courts are bound to follow the law of the State of California, the state in which the Courts were sitting.

Erie R.R. v. Tompkins, 304 U.S. 64;
Guaranty Trust Co. v. York, 326 U.S. 99.

In the case of *Neff v. New York Life Ins. Co.,* supra, an action was brought to recover a ten-year accrual of disability payments under an insurance contract. The insurer, after receiving notice of the insured's claim, denied liability. Long after the insured's death, the administrator of his estate filed action and sought to avoid the bar of the statute of limitations by alleging that defendant, knowing the insured was disabled, fraudulently represented that he was not entitled to any benefits under the policy. The Supreme Court of California (Justice Carter dissenting) held that the insurer was not estopped to set up the defense of the statute of limitations where it concealed no fact, but advised the insured that the insured had no right to collect for disability under the policy. At page 172, the Court stated:

> "Plaintiff argues that defendant's interpretation of its policy so as to relieve it of liability misled the insured and his widow as to the insured's right to disability benefits and so, in effect, amount to the concealment of the 'fact' of the insured's cause of action. In this connection plaintiff cites the settled rule that an insurer has the duty of exercising good faith in its dealings with the insured and cannot take any unfair advantage of him. (See 12 Appleman, Insurance Law and Practice, Sect. 7291, p. 390; Farrar v. Policy Holders Life Insurance Assn., 3 Cal. App. 2d 87, 93 (39 P. 2d 229).) But de-

fendant's acts cannot be relied upon to bring plaintiff within the rule mentioned for that would mean that no insurer could deny liability without indefinitely suspending the running of the statute of limitations until perchance the insured, or his heirs after his death, might obtain at some future time legal advice indicating the view that liability existed. Here defendant clearly stated in its letter of May 4, 1927, that it did not feel justified in approving the insured's claim for disability benefits as 'from the evidence submitted and information obtained by the Company, it does not appear to the Company that he is wholly and permanently disabled within the meaning of the provision in the policy.' Defendant, concealing no fact from the insured, was free to take this position. The insured, knowing all the facts which were known to defendant, was then free to litigate the issue of the liability which defendant had denied. It is a matter of common knowledge that there are often differences of opinion concerning liability under insurance policies *and no mere denial of liability, even though it be alleged to have been made through fraud or mistake, should be held sufficient, without more, to deprive the insurer of its privilege of having the disputed liability litigated within the period prescribed by the statute of limitations.* (Italics added.)

* * * * * * *

"Likewise an analysis of the equitable estoppel cases cited by plaintiff discloses that they were decided upon distinguishable factual considerations. First to be noted are the cases where the estoppel doctrine was applied to sustain the plaintiff but the question of the statute of limitations was not involved: Morrison v. Mutual Life Insur-

ance of New York, 15 Cal. 2d 579, 588 (103 P. 963); Glickman v. New York Life Insurance Co., 16 Cal. 2d 626, 634-635 (107 P. 2d 252, 131 A.L.R. 1292); and Bonacci v. Massachusetts Bonding & Insurance Co., 58 Cal. App. 2d 657, 662-663 (137 P. 2d 487). Second to be noted are the cases where the statute of limitations was an issue, and under varying and distinctive factual premises the estoppel doctrine was applied against its assertion: Rutherford v. Rideout Bank, 11 Cal. 2d 479, 486 (80 P. 2d 978, 117 A.L.R. 383), and Laraway v. First National Bank of La Verne, 39 Cal. App. 2d 718, 728-729 (104 P. 2d 95), where there was a confidential relationship between the parties which operated to excuse the plaintiff from failing to make earlier discovery of the cause of action; * * *"

3. It is respectfully urged that the equitable doctrine of estoppel illustrated by the cases of *Tyra v. Board of Police and Fire Pension Commissioners,* 32 Cal. 2d 66, 197 Pac. 2d 710, and *Phillis v. City of Santa Barbara,* ..... Cal. App. 2d ....., 229 Advance California Appellate Reports 47, is not applicable to the admitted facts in this case. In those cases the person sought to be barred by the statute of limitations had not only been given erroneous information, but the erroneous information or advice was such as to induce delay. For example, in the *Tyra* case the Court stated:

"Although it was denied by the answer, it is now conceded that the defendants and the attorneys representing them advised the plaintiff that so long as he was receiving workmen's compensation benefits he was not entitled to a pension. He was

> advised that he could not have both, and that benefits under the compensation act were 'in lieu of and in place of the benefits provided in section 187 of the Charter.' * * * The delay charged to the plaintiff was induced by the erroneous position and advice of the defendants and their attorneys. They may not therefore now properly interpose the defense as a bar to the plaintiff's delayed course of action."

In this case, the admitted facts clearly show that there was no inducement by petitioner, concealment of fact nor deceptive utterance by petitioner which would tend to lull the insured to forebear action. The language used by petitioner in its letter to respondent on March 3, 1948 (see above) clearly stated, "No further payment can be made for any disability due directly or indirectly, wholly or in part, to your present disability. * * *" There was nothing in the language used which would induce respondent to delay bringing action. He may have believed that petitioner was correct in its position and therefore failed to challenge that position from 1948 until 1963, but that should not estop petitioner from interposing the contractual limitation defense. Suppose petitioner had said to respondent,

> "This is our final payment to you. We do not owe you any more for your present disability and will not pay you any more while you are suffering from your present disability."

Under the reasoning of the Court below would such language have estopped petitioner from relying upon the contractual limitation provision. If so, how can an

insurer ever commence the running of the statute of limitations or a contractual limitation provision. If not, what is the difference between the language actually used in the March 3, 1948 letter to respondent and the suppositious language next above. Does the language in the one case induce delay and not in the other; does the language in the one situation include more erroneous statements than in the other. Certainly erroneous statements which do not induce delay in pursuing a remedy should not be sufficient to estop one from relying upon the bar of a contractual limitation provision.

We earnestly believe that the *Neff* case (supra) states the California law applicable to the instant case.

4. The Court below combines an erroneous statement on the part of petitioner with the fact that petitioner is a labor union operating a fraternal benefit insurance business to find an estoppel. We believe the decision of the Court of Appeals discriminates against a labor union operating a fraternal benefit insurance society in that first, it assumes a high degree of trust and confidence on the part of an insured member toward his union insurer, and second, it imposes greater burdens upon a labor union operating a fraternal benefit society with respect to denying liability and commencing the running of the contractual period of limitations than would be applicable to any other insurance carrier. In this connection, the opinion of the Court below states:

> "We think it did not show an inexcusable lack of due care for his own interests, on the part of the

> plaintiff, that he did not suspect that his union was doing him wrong and take his papers to a lawyer."

This can only mean that a union or fraternal insurer is powerless to commence the running of the contractual period of limitations by a denial of liability under the insurance contract; and this would follow whether or not a reason, erroneous or correct, were given for the denial. Since the law is well settled that the relationship between a mutual life insurance company and its policyholder is at arm's length and does not create a trustee-beneficiary relationship, the decision of the Court below imposes a much greater burden upon a labor union fraternal benefit insurance society than a mutual insurance company. (See, *Shapiro v. Equitable Life Assur. Soc.*, 76 C.A. 2d 75, 172 P. 2d 725.) This would be manifestly unjust; the fraternal benefit society must comply with the same rules and regulations of the insurance commissioners of the several states as do the stock and mutual insurers. Furthermore, there is no agreed fact in this case which would indicate that plaintiff's feelings or attitude toward the petitioner were any different from those feelings or attitudes he might have had toward a stock or mutual insurer.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, Oakland, California,
March 26, 1965.

Respectfully submitted,
HILDEBRAND & MCLEOD,
KENNETH L. WHITE,
Attorneys for Petitioner.

(Appendices A and B Follow)

Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM CHARLES ELLGASS,
Appellant,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN INSURANCE DEPARTMENT, INC., et al.,
Appellees.

No. 19,338

[February 4, 1965]

On Appeal from the United States District Court for the Northern District of California, Southern Division

Before: MADDEN, Judge of the Court of Claims, and BARNES and KOELSCH, Circuit Judges.

MADDEN, Judge:

The appellant, hereinafter called plaintiff, sued the appellee, hereinafter called defendant, in the United States District Court for the Northern District of California, Southern Division. That court had jurisdiction because of the diversity of citizenship of the parties. That court granted summary judgment in favor of the defendant, and the plaintiff has appealed to this court from that judgment.

The suit is for money which, the plaintiff claims, the defendant owes him on a policy of insurance issued to him by the defendant in 1939. The defendant is a labor union, and one of its activities is to furnish to members of the union, in consideration of the payment of specified premiums, certain kinds of life, accident and health insurance. In 1939 the plaintiff was a brakeman on the Pennsylvania Railroad and a member of the defendant union. He applied for and the defendant issued to him the "certificate" or policy of insurance upon which this suit is based.

The plaintiff's policy, in its Parts One and Two, provided for payments of specified sums to the insured if he, by accident, suffered certain named injuries, the loss of both eyes, the loss of one foot, etc., being examples of those coverages. Then in Part Four, the policy provided, in pertinent part:

> If such injuries, described in the insuring clause, do not result in any of the above mentioned specific losses but shall . . . wholly and continuously disable the member for one day or more, and so long as the member lives and suffers said total loss of time, the Brotherhood will pay, beginning with the eighth day of such disability, a monthly indemnity at the rate of the monthly benefit provided, not exceeding twenty-four months.

The monthly benefit was $100 per month.

Effective on the same date as the policy itself the defendant issued to the plaintiff, for an additional consideration, its "Lifetime Indemnity Rider" providing that the monthly payments would be made during the lifetime of the insured, if his disability continued that long. Also on the same day, for a further additional premium, the defendant issued to the plaintiff a "Waiver of Premium Rider" providing that no premiums should be payable on the policy during a period of total disability for which the insured was drawing benefits.

On September 7, 1945, the plaintiff, while serving as a brakeman on the Pennsylvania Railroad, suffered an injury to his left knee. The injury was not, at the time, disabling, and the plaintiff continued to work as a brakeman until June 28, 1946, at which time the injury to his knee became totally disabling. The total disability has been continuous down to the date of the filing of this suit on February 11, 1963. That would seem to mean that the defendant should have paid the plaintiff $100 per month for 17 years. In fact the defendant has paid the plaintiff, during the 17 years, only $2,003.34, and has also received premiums from the plaintiff during the 17 years, in spite of the waiver of premium rider referred to above.

The defendant says that the plaintiff is not entitled to recover anything, and, as we have seen, its motion for a summary judgment in its favor was granted by the District Court. We now dis-

cuss the reasons which the defendant urges in support of its position. Its first two points, as stated in its brief, are:

> 1. Plaintiff did not give written notice to defendant as required by the insurance contract.
>
> 2. Plaintiff did not furnish defendant with affirmative proof of loss as required by the terms of the insurance contract.

There is no merit in either of these contentions. As we have seen, the plaintiff was injured on September 7, 1945. He continued to work until June 28, 1946. On July 8, 1946, he notified the defendant of his injury. Beginning some time before August 5, 1946, there ensued correspondence between the plaintiff and the defendant's General Secretary and Treasurer, in which no objection whatever was made by the defendant on the ground of any lack or lateness of notice, or failure to furnish any kind of proof. The defendant caused an investigation to be made by a professional investigating agency, decided that the claim was meritorious, that the disability had commenced on June 28, 1946, and that disability benefits would be paid. It so advised the plaintiff by a letter on August 14, 1946, and paid him $100 a month until, 20 months later, it decided to discontinue the payments. That discontinuance will be discussed hereinafter.

The events described above demonstrate a clear case of waiver by an insurance company of lack of notice and failure to prove loss. The law on the subject is tersely summarized in Section 554 of the California Insurance Code, which says:

> Delay in the presentation to an insurer of notice or proof of loss is waived, if caused by an act of his, or if he omits to make objection promptly and specifically upon that ground.

The defendant's fourth ground of defense is stated by it in its brief as follows:

> 4. Plaintiff's disability did not occur within the time period provided in the insurance contract.

In our quotation hereinabove of Part Four of the policy, we showed an omission of some language not pertinent to the point then under discussion. In the omitted language, Part Two says that if such injury shall "within ten days from the date of accident,"

wholly and continuously disable, etc., the defendant will pay, etc. If the defendant had contended in 1946, as it contends in 1965, that a disability first effective in June, 1946, resulting from an injury which occurred in September, 1945, was not covered by its policy because of the ten-day clause quoted above, a court would have had to decide whether the so-called "process of nature" doctrine would apply in the interpretation of the policy. That doctrine is discussed in 45 Corpus Juris Secundum, Insurance, § 901(c), and cases from Nebraska, Texas, Washington, Kentucky, and a Federal District Court in Missouri are cited applying the doctrine, and no contrary authority is cited. The defendant in its brief says that the doctrine is applicable only to the spread of infection or disease or deterioration certain to occur. The defendant cites no authority for such a restriction of the doctrine and no reason for it occurs to us.

We do not, however, have the task of interpreting this language of the defendant's policy. The defendant itself interpreted it. With full knowledge that the plaintiff's injury had occurred many months before he had ceased to work, it accepted, investigated and processed his claim, designating it in all of its letters to him as a disability situation, paid him disability payments for 20 months, and waived the payment of premiums for those months pursuant to the rider providing for waiver of premiums during disability. The defendant cannot expect from the plaintiff or a court an interpretation of its writing more favorable to it than its own interpretation.

We still have for consideration the defendant's third contention. It is:

> Plaintiff's action is barred by the terms of the contract since it was not brought until long after five years from the expiration of time within which proof of loss is required by the contract of insurance.

Provision 13 of the "Standard Provisions" of the plaintiff's policy says that no action at law or in equity shall be brought on the policy unless brought within five years from the expiration of the time within which proof of loss is required by the policy.

We do not stop to discuss the somewhat awkward language of this provision, because it is evident that, whatever might be taken

as the starting point for the five years, the five year period has been greatly exceeded, and that the plaintiff cannot escape the bar of this limitation unless he has some valid reason why the limitation provision should not be applied to him.

As we have seen, the defendant in August, 1946, determined that the plaintiff was disabled and began to pay him $100 per month disability pay. These payments continued until March, 1948, at which time the defendant wrote the plaintiff as follows:

> This is the final payment due under Part Eight of your Certificate. No further payment can be made for any disability due directly or indirectly, wholly or in part, to your present disability, or for any other disability while this present condition disables you. Therefore, if you desire to cancel your Certificate, return it in the enclosed self-addressed, stamped envelope with a signed letter so stating.

The defendant's letter contained statements and assumptions which were erroneous, fundamentally and dangerously erroneous. Part Eight of the policy, to which the letter referred and which the defendant applied in cutting off the payments to the plaintiff, had nothing whatever to do with the plaintiff's situation. Part Eight covers disabilities due to sickness, and nothing else. The defendant never thought the plaintiff was sick. Part Eight, the sickness provision, also provided for payments of $100 per month but limited the payments to 24 months, and there was no rider, such as there was applying to Part Four, the injury provision, extending payments for life if the disability continued for life. The waiver of premium rider did not apply, in the case of sickness, beyond 24 months because it applied only to periods during which the insured was drawing disability benefits.

As we have said, the plaintiff did not bring this suit until much more than five years had elapsed after the defendant discontinued its payments to him. The plaintiff says that, in spite of this lapse of time, the period of limitation provided in his contract has not run against his claim because, in the circumstances, the defendant is estopped from relying on that provision. We agree with the plaintiff.

The certificates of insurance issued by the defendant were available only to members of the defendant union, the Brotherhood of Railroad Trainmen. The riders attached to them were signed by

A. F. Whitney, the President of the Union, and by the General Secretary and Treasurer of the Union. The correspondence which the plaintiff had with the defendant with regard to his injury was answered by the General Secretary and Treasurer in friendly, man to man letters which addressed the plaintiff as "Dear Sir and Brother," and ended "Fraternally Yours." We think it is only realistic to suppose that this plaintiff, this brakeman, reposed more trust and confidence in President Whitney and the General Secretary and Treasurer of his union than in anyone else in the world. He would have gone on strike, if President Whitney told him to do that, and would have immediately returned to work if President Whitney told him to do that. The defendant union, in operating its insurance department, did not purport to entrust it to underlings whose statements and actions even a brakeman might question. The letters to this brakeman came from the General Secretary and Treasurer, the highest officer in the union, after President Whitney. We think it did not show an inexcusable lack of due care for his own interests, on the part of the plaintiff, that he did not suspect that his union was doing him wrong and take his papers to a lawyer. He had been told that his case came within Part Eight of his insurance certificate, and that he had been paid all that he was entitled to receive. These statements were inexcusably erroneous on the part of the union, and we see no equity in permitting the union to profit by its own wrong. The equitable doctrine which we are applying is illustrated in the case of Tyra vs. Board of Police and Fire Pension Commission, 32 Cal. 2d 666, in which Justice Shenk, for a unanimous court, wrote that an erroneous statement by the Board to a fireman that he could not draw a pension while he was receiving Workmen's Compensation for an injury, estopped the Board from later pleading the Statute of Limitations in the fireman's suit for his pension. The 1964 decision in the case of Phillis v. City of Santa Barbara, ... Cal. App. 2d ....., 40 Cal. Rep. 27, is another example of the application of this doctrine of estoppel in an appropriate situation.

Our conclusion is that the District Court was in error in granting the defendant's motion for summary judgment, and we reverse that judgment.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 19,338

William Charles Ellgass,
Appellant,

vs.

Brotherhood of Railroad Trainmen Insurance Department, Inc., et al.,
Appellees.

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

Filed and entered February 4, 1965.